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No. 83-1092

In the Supreme Court of the United States

OCTOBER TERM, 1983

EUGENE BOFFA, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (1) that the trial court erred in failing to instruct the jury that under the RICO statute, 18 U.S.C. 1962(c), the predicate acts of racketeering must be related to each other; (2) that he was deprived of effective assistance of counsel because his trial attorney had a conflict of interest; and (3) that his sentence was disproportionate to the crimes for which he was convicted.

1. After a jury trial in the United States District Court for the District of Delaware, petitioner was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and seven counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to concurrent

20-year prison terms on the RICO counts, and to seven consecutive sentences totalling 19 years and ten months on the mail fraud counts, to be served concurrently with the sentences on the RICO counts. In addition, petitioner was fined $47,000 and ordered to forfeit his interest in the corporations associated with the enterprise. The court of appeals affirmed the RICO convictions, reversed the mail fraud convictions, and remanded for resentencing[1] (Pet. App. 1a-40a). Prior to resentencing, petitioner petitioned for a writ of certiorari, and this Court denied the petition. No. 82-814 (Mar. 7, 1983).

On remand, the district court again sentenced petitioner on the RICO counts to concurrent 20-year prison terms, fined him $40,000, and again ordered the forfeiture of his interest in the corporations associated with the enterprise. The court of appeals affirmed by judgment order (Pet. App. 62a-64a).

The evidence is related in detail in our opposition to petitioner's first petition for a writ of certiorari (82-814 Br. in Opp. 4-9). Briefly, it established that an enterprise, consisting of petitioner and others, engaged in a series of unlawful schemes in connection with a labor leasing operation centered in New Jersey. The schemes included making payoffs to a union leader in exchange for assurances of labor peace and assistance in obtaining contracts; defrauding employees at several plants of their contractual rights to wages and benefits; defrauding the employees of economic benefits under rights guaranteed by the National Labor Relations Act; defrauding the employees of their right to the loyal, faithful, and honest services of the president of their union; and obstructing justice by supplying altered documents to the grand jury.

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[1]The court of appeals remanded for resentencing to ensure that petitioner's convictions on the mail fraud counts, which were reversed on appeal, did not influence the sentences on the RICO counts.

The schemes were carried out under the direction of petitioner, who was the owner or principal figure in a number of related corporations. The schemes were effected mainly by switching the labor leasing contracts at various plants from one company controlled by the enterprise to other companies that were ostensibly independent but were in fact also controlled by the enterprise. The switches resulted in the loss of wages and benefits to the employees who worked for the enterprise's labor leasing companies at those plants. In order to make the schemes succeed, petitioner and his co-defendants deceived the employees by denying that there was a relationship between the labor leasing company that had employed them and the new labor leasing company that took over the employment contract at the plant. By means of the payoffs made to the union leader, the enterprise obtained his cooperation in the scheme.

2. Two of petitioner's claims — that the trial judge erroneously failed to instruct the jury that the predicate acts of racketeering charged in the indictment must be related to each other and that he was deprived of the effective assistance of counsel because his trial attorney had a conflict of interest — were raised by petitioner in his earlier petition for a writ of certiorari (82-814 Pet. 16-30). As explained in our opposition to that petition (at 11), the trial court's instruction was correct[2], and petitioner failed to object to it; moreover, as the court of appeals held (Pet. App. 35a), petitioner was not prejudiced by the alleged error in the

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[2]The court instructed the jury that the predicate acts of racketeering must be related only in the sense that they furthered the affairs of the same alleged enterprise (C.A. App. 292, 294). The courts of appeals have held that no other connection or relationship need be shown. See, *e.g.*, *United States* v. *Provenzano*, 688 F.2d 194, 200 (3d Cir. 1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 449 U.S. 871 (1980); *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

instruction because he "[did] not assert that the predicate acts charged in the indictment were in fact unrelated."

The court of appeals properly rejected petitioner's ineffective-assistance-of-counsel claim because, as we also explained in our opposition to the earlier petition (at 12-15), during a lengthy hearing in district court petitioner expressly waived objection to any possible conflict of interest on the part of his trial counsel, who had previously represented a government witness and three other defendants in the case.

Petitioner offers nothing new in the instant petition to rebut our arguments; indeed, insofar as his challenge to the instruction and his ineffective-assistance-of-counsel claim are concerned, the two petitions are virtually identical.[3] This Court did not see fit to grant review of these claims when petitioner first presented them, and there is no reason for a different result here.[4]

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[3]In support of his challenge to the instruction, petitioner does cite two cases not previously mentioned, *United States* v. *Bledsoe*, 674 F.2d 647 (8th Cir. 1982), cert. denied, 459 U.S. 104 (1982), and *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, No. 82-728 (Jan. 10, 1983). While the court in *Bledsoe* did express doubt about the correctness of the view of other courts of appeals that the predicate acts of racketeering "need not be related in any manner other than that they were perpetrated through an enterprise" (674 F.2d at 661), it did not decide the issue, which was not presented in the case before it. Likewise, in *Computer Sciences* the court merely questioned, without deciding, whether "Congress ever contemplated the extension of the RICO statute to include a situation where one of the predicate offenses, separated in character and by a long period of time, could combine with a set of closely related wire fraud and mail fraud claims essentially representing subdivisions of a single on-going illegal act to meet the predicate requirements * * *." 689 F.2d at 1189.

[4]In the midst of his challenge to the RICO instruction, petitioner argues (Pet. 22-24) that the four predicate Taft-Hartley violations involving the delivery of free use of an automobile to co-defendant Sheeran in fact constituted but a single predicate act and that the court of appeals, in rejecting this claim (Pet. App. 28a-32a), relied on a theory

3. In addition, petitioner contends (Pet. 34-42) that his sentence was disproportionately harsh. In support of his claim, petitioner observes that if the predicate acts had been separately charged as substantive offenses, he could have been sentenced to a maximum of six years' imprisonment and a $15,000 fine, instead of the 20-year prison sentence and $40,000 fine that were imposed under the RICO statute. This is factually incorrect. If the predicate acts had been charged as substantive offenses, and the racketeering conspiracy charge had been replaced by a general conspiracy count, petitioner would have been subject to a maximum sentence of 15 years' imprisonment and $65,000 in fines.[5] Moreover, because the district court imposed concurrent sentences on the racketeering and racketeering conspiracy counts, the sentence that petitioner received was only half as great as the sentence that the court could lawfully have imposed.[6]

At all events, petitioner's suggestion that a court's discretion in imposing sentence for a RICO violation is delimited by the maximum sentence that could have been imposed if

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never presented to the jury. This contention was raised by co-defendant Kalmar in his petition in No. 82-878 and we responded to it in detail at that time (82-878 Br. in Opp. 16-21). This Court declined to review the issue then and, since petitioner offers no new arguments to support the claim, there is no reason for the Court to do so now.

[5]The conspiracy count (18 U.S.C. 371) would have exposed petitioner to five years' imprisonment and a $10,000 fine. The obstruction of justice charge (18 U.S.C. 1503) would have subjected him to five years' imprisonment and a $5000 fine. And each of the five Taft-Hartley violations (29 U.S.C. (& Supp. V) 186) would have exposed him to one year's imprisonment and a $10,000 fine.

[6]Petitioner cites *Solem* v. *Helm*, No. 82-492 (June 28, 1983) for the proposition that disproportionate sentences violate the Eighth Amendment. However, in *Solem* the defendant was sentenced to life imprisonment without possibility for parole under South Dakota's recidivist statute for uttering a "no account" check for $100 — a situation remote from that presented here.

the predicate acts of racketeering had been charged as substantive offenses is not well taken. It is settled that a defendant may be separately punished for a RICO violation *and* the predicate acts of racketeering. See, *e.g., United States* v. *Boylan*, 620 F.2d 359, 361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Rone*, 598 F.2d 564, 571 (1979). The purpose of the RICO statute was to establish "new penal prohibitions, and * * * *enhanced sanctions* and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (Statement of Findings and Purpose) (emphasis added). Because organized criminal activity is especially dangerous and damaging to society, enhanced sentences are clearly justified. Petitioner's proposed restriction on RICO sentencing authority would essentially nullify this congressional purpose.

Seizing on the district court's remark during resentencing that "maybe one of the things I had in mind was to set an example that racketeering and violation of the RICO Act shall not take place in Delaware * * *"(C.A. App. 112a), petitioner also argues that the court improperly interjected "parochialism" into the sentencing proceeding. However, the court's comment does not evince any improper "parochialism." Unlike the situation in *United States* v. *Diamond*, 561 F.2d 557 (4th Cir. 1977), upon which petitioner relies, the court's comment did not reflect a bias against petitioner because he was from another state. Rather, the court's comment reflected a perfectly legitimate concern to deter racketeering offenses within the district, whether committed by persons from within Delaware or from outside. It is well settled that general deterrence is an appropriate consideration in sentencing. See *Williams* v. *New York*, 337 U.S. 241, 248-249 n.13 (1949); *Blair* v. *United States*, 665 F.2d 500, 508 (4th Cir. 1981).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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